Supreme Court, U.S.
FILED
MAR 8 2002
CLERK

(3)

No. 01-968

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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March 8, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Counsel of record for the Coalition for Affordable Local and Long Distance Service ("CALLS") submits this corporate disclosure statement pursuant to Supreme Court Rule 29.6:

CALLS is a coalition of leading local and long-distance telephone companies aimed at keeping phone service affordable while delivering on the Telecommunications Act of 1996's promise of competition and choice in all telecommunications markets. The members of CALLS are AT&T Corp., BellSouth Corporation, SBC Communications Inc., Sprint Corporation, and Verizon Communications.

AT&T Corp. has no parent company. No publicly held company owns 10 percent or more of AT&T Corp.'s stock.

BellSouth Corporation has no parent company. No publicly held company owns 10 percent or more of BellSouth Corporation's stock.

SBC Communications Inc. has no parent corporation. No publicly held company owns 10 percent or more of SBC Communications Inc.'s stock.

Sprint Corporation is a holding company whose subsidiaries engage in telecommunications and related businesses and is publicly traded under the names of Sprint FON and Sprint PCS. No person or corporate entity owns 10 percent or more of Sprint Corporation.

Verizon Communications is the entity resulting from the merger of GTE Corporation with Bell Atlantic Corporation, which, prior to the merger, were both independent members of CALLS. On June 30, 2000, GTE Corporation merged with a wholly owned subsidiary of Bell Atlantic Corporation (with GTE Corporation as the surviving first-tier subsidiary of Bell Atlantic Corporation), and Bell Atlantic Corporation began doing business as Verizon Communications. Verizon has no parent companies. No publicly held company has a 10 percent or greater ownership interest in Verizon Communications.

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BRIEF IN OPPOSITION

INTRODUCTION

The petition fails to demonstrate that the "question presented" satisfies any of this Court's standards for the exercise of its certiorari review. Part I of the petition presents only a reargument of the merits of the question presented, without any serious discussion of reasons why the question requires this Court's attention. In fact, petitioner's lengthy argument represents no more than a rehashing of its disagreement with a nearly five-year-old determination of the Federal Communications Commission ("FCC") that the costs of the end-user connection to the telephone network should be recovered from end users. That determination had previously been upheld by the Eighth Circuit Court of Appeals, and was upheld for a second time in the Fifth Circuit's decision below.

Part II of the petition presents the novel claim that the Court should resolve a purported "conflict" between federal and state regulators. This argument is procedurally barred because petitioner failed to present it below. Even apart from this fatal procedural defect, however, this clearly would not be a proper basis for the exercise of this Court's review. The decisions of state regulators upon which petitioner relies are subject to review in the first instance within the state court systems, not by this Court.[1] No conflict exists today between any state court of last resort and any federal circuit on petitioner's question presented, and state high courts confronted with the question may well side with the two federal circuits that have addressed the issue. Review by this Court is therefore premature—in the unlikely event that a disagreement arises between a state court of last resort and a federal court of appeals in the future, this Court's review may be sought at that time.

In any event, the FCC Order challenged by petitioner addresses recovery of *only* those costs allocated to the *inter*-state jurisdiction, which are regulated by the FCC, and over which state regulators (who regulate *intra*state rates) have no authority. Accordingly, on the only issue properly presented here—*inter*state cost recovery—there can be no "conflict" between state and federal regulators. Moreover, because state and federal regulators have separate spheres of responsibility, the mere fact that they may apply the provisions of a federal statute differently within their respective realms does not subject parties to inconsistent obligations.

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[1] In *Verizon Maryland Inc. v. Pubic Service Commission of Maryland*, No. 00-1531 and *Mathias v. WorldCom Technologies*, No. 00-878, this Court is currently considering questions involving the scope of federal court review of state regulators' actions under provisions of the Telecommunications Act not implicated here. This petition presents no question involving the scope of federal court review.

Accordingly, this Court should deny petitioner's request for certiorari review.

STATEMENT OF THE CASE

The petition arises out of a longstanding disagreement between petitioners and the FCC over how the interstate-allocated costs of local exchange carrier ("LEC") facilities used to provide both intrastate and interstate service should be recovered. Under the Communications Act, the FCC regulates the rates and terms of *inter*state "access service"—the service that LECs provide to connect end users with interexchange carriers (IXCs) when end users make long distance calls—while the various state com missions regulate local services and *intra*state access. *See generally Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984) ("*NARUC*").

Because LEC facilities such as the line from the end user's home to the LEC's switching office (called the "loop" or "common line") are used to provide both intrastate and interstate service, the costs of those facilities are allocated between the federal and state jurisdictions. *See Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). Federal and state regulators, respectively, then make rules for recovering those costs allocated to their separate jurisdictions. Since 1983, FCC rules have required that at least a portion—and in some cases all—of the interstate loop costs of the regulated telephone company be recovered through a charge to end users. NASUCA has objected to this end-user charge for nearly twenty years. *See, e.g., NARUC*, 737 F.2d at 1111-1115 (rejecting the argument of NASUCA and others that the FCC lacked authority to impose flat-rate end user access charges).

The FCC undertook a major reexamination of its rules governing the recovery of interstate-allocated common line costs following enactment of the Telecommunications Act of 1996. Congress directed the FCC to "thoroughly review the existing system of universal service support." *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 13 (1996). One part of that existing universal service support was the access charge regime, which had historically limited the recovery of interstate-allocated loop costs for at least some end users to less than the full loop cost. The remainder was recovered from IXCs through a per-minute charge assessed on long distance calls. Following passage of the 1996 Act, however, the Commission recognized that rate structures that do not reflect the way that costs are incurred cannot be maintained in a competitive market, and need to be reformed.

The order challenged by petitioner is the second step in the Commission's efforts to reform interstate loop cost recovery. The Commission's *Access Charge Reform First Report*,[2] adopted in 1997, took the first step by increasing the permissible end-user charge (called the "Subscriber Line Charge," or "SLC") for multi-line business lines and non-primary residential lines. With only a few exceptions, those end users were made responsible for 100% of interstate-allocated loop costs. *See id.* at 16014. The Commission reasoned that in a competitive market, the costs of interstate access that do not vary with usage—primarily loop costs—should be recovered through flat-rate, non-usage sensitive rates assessed on the "cost causer," namely, the end user, rather than through per-minute charges to long distance carriers. *See id.* at 16008-14. At that time, however, because of stated universal service concerns, the *Access Charge Reform First Report* did not extend this change to primary residential and single-line business lines. Instead, the FCC

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[2] *See Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982 (1997) ("*Access Charge Reform First Report*").

created a flat-rate charge to interconnected IXCs—called the "Presubscribed Interexchange Carrier Charge, or "PICC"—to recover a portion of interstate-allocated loop costs for primary lines. Long distance carriers implemented charges to pass the PICC on to end-user consumers.

Following the *Access Charge Reform First Report*, the Texas Office of Public Utility Counsel ("TOPUC")—a member of petitioner NASUCA—sought review of the Commission's decision to raise the SLC cap to recover 100% of interstate-allocated loop costs for multi-line business and non-primary residential lines from end users. TOPUC there made precisely the claim that NASUCA pursues in this petition. Specifically, TOPUC argued that because loop cost recovery was not "shared" between end users and long distance carriers, the Commission's decision violates the 1996 Act's requirement that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." 47 U.S.C. § 254(k).

The Eighth Circuit flatly rejected that argument, holding that the quoted language merely "empowers the FCC to establish rules to prevent LECs from overallocating to supported services the costs of facilities that are used to provide services in both categories." *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 559 (8th Cir. 1998). "Because the SLC is a method of *recovering* loop costs," the court concluded, and "not an *allocation* of those costs between supported and unsupported services, § 254(k) is not implicated." *Id.* (emphasis added).

The present petition arises from the Commission's decision in its *CALLS Order*[3] to extend the "cost causation" principle

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[3] *Access Charge Reform, Price Cap Performance Review For Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket

of the *Access Charge Reform First Report* to primary residential and single-line businesses. In adopting the *CALLS Order*, the Commission concluded that eliminating the PICC and increasing the residential and single-line business SLC would "make common-line [loop] billing more efficient and more closely aligned with costs." 15 FCC Rcd. at 12991-92. It also found that by progressively raising the SLC cap for primary lines, and recovering a greater proportion of interstate-allocated loop costs through the SLC, it would "reduce[], and in most cases remove[] the subsidies" historically built into access charges. *Id.* at 12975-76. Finally, the Commission noted, the proposal would "keep[] rates affordable in high-cost areas, by replacing the [implicit] subsidies with explicit . . . universal service support." *Id.*

Before the Commission, TOPUC and others (including petitioner NASUCA) repeated the argument that the Eighth Circuit had rejected in *Southwestern Bell*—that Section 254(k) requires that recovery of interstate-allocated loop costs must be shared between end users and IXCs. The FCC again rejected that claim, explaining:

> Section 254(k) is directed at the *allocation* of costs between competitive and non-competitive services . . . and prohibits subsidization of [the former by the latter] . . . The SLC is a method of *recovering* loop costs; not an allocation of those costs between supported and unsupported services. Contrary to opponents' arguments, nothing in section 254(k) precludes the Commission from permitting recovery of common line charges properly *apportioned* to interstate access from subscribers on a flat-rated basis.

CALLS Order, 15 FCC Rcd. at 12998-99. The Commission concluded that there is "no legal impediment to a federal

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Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd. 12962 (2000) ("*CALLS Order*").

recovery mechanism that simply requires all telephone subscribers to pay, on a per-line basis, for that portion of their *necessarily-incurred local telephone plant costs* that is assigned to the interstate jurisdiction." *Id.* at 12999.

Following the *CALLS Order*, TOPUC (now joined by petitioner NASUCA) again petitioned for review of the Commission's construction of § 254(k), this time essaying the Fifth Circuit. The court's opinion first noted that "[o]ne of the petitioners, TOPUC, had presented this very same argument in challenging the [*Access Charge Reform First Report*], which had increased the SLC price cap on multi-line businesses." *TOPUC v. FCC*, 265 F.3d 313, 324 (5th Cir. 2001). It then held:

> We agree with the Eighth Circuit['s decision in *Southwestern Bell*]. Section 254(k) concerns cost allocation of joint and common costs, while the SLC . . . involve[s] the recovery of such costs. Thus, § 254(k) does not implicate the SLC . . . . [C]ost recovery involves how and from whom the funds are collected, while cost allocation refers to how costs are disbursed.

Id. The judges of the Fifth Circuit panel, in the decision now challenged by petitioner, thus represent only the most recent adherents to an interpretation of § 254(k) unanimously held by *every* federal agency and circuit judge to examine this issue to date.

REASONS FOR DENYING THE WRIT

1. The petition makes little effort to justify certiorari review under this Court's usual standards for issuance of the writ. Petitioner does not claim, for example, that the Fifth Circuit's unremarkable holding that 47 U.S.C. § 254(k)'s provisions governing cost *allocation* have no bearing on questions of cost *recovery* has created any confusion among the federal courts of appeal. In fact, as noted above, quite the opposite is true: the lower court's unanimous ruling places it

squarely in the company of every federal authority to address this issue, including all five Commissioners of the FCC and a unanimous panel of the Eighth Circuit.

2. Nor does petitioner claim that the lower court's ruling presents a conflict with relevant decisions of this Court. Indeed, apart from some general quotations from well-known cases regarding statutory construction and the proper framework for review of agency decisions, the text of petitioner's lengthy argument is essentially bereft of citation to the decisions of this Court. And petitioner cannot seriously maintain that the writ should issue here so that the Court may instruct the Fifth Circuit on the proper application of such cases as *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and *Packard Motor Car Co. v. Nat'l Labor Relations Bd.*, 330 U.S. 488 (1947). In any event, both the Fifth Circuit (below) and the Eighth Circuit (in *Southwestern Bell*) properly applied *Chevron*, and rejected petitioner's argument that the "plain language" of § 254(k) compelled a contrary result.

3. Petitioner asserts that the proper interpretation of § 254(k) of the Communications Act represents "an important question of federal law not yet decided by this Court." Petition 13; *see also* S. Ct. Rule 10(c). But petitioner utterly fails to demonstrate why this is so in the face of unanimous federal court and agency rejection of its position. Instead, petitioner primarily reargues the merits of the statutory interpretation issues rejected by the Fifth and Eighth Circuits.[4]

When petitioner does stray from its re-argument of the merits to try to explain why the purportedly "important"

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[4] The heading of the petitioner's main argument, to which it devotes nearly ten pages of its petition, is "The Decision Below Contradicts the Plain Meaning of § 254(k)." Petition 14. On its face, that is obviously a reargument of the merits.

question it presents "should be[] settled by this Court," S. Ct. Rule 10(c), its efforts only confirm that the opposite is true: The lower court ruling challenged by petitioner was a fact-bound application of settled law, with no negative consequences for the law or society as a whole.

Petitioner's main argument—the allegation that the Fifth Circuit did not adhere to established statutory construction principles [5]—bears no relation to this Court's certiorari standards. The "canons of statutory construction" that petitioner invokes are, by petitioner's own admission, "settled," Petition at 14, and their narrow application to the unique facts of this case clearly does not merit certiorari review in the absence of a conflict among the circuits, or between a federal circuit court and a state court of last resort. Moreover, as noted above, the Fifth Circuit did decide the case before it consistently with settled law, and certainly needs no tutorial on the routine application of such well-known cases as *Chevron* and *Packard Motor Car*.

Petitioner's second effort to justify review centers on the claim that the "FCC's rationale . . . that the cost of carrier access is only variable or marginal cost and should not include any contribution toward the fixed costs of the network . . . . is inconsistent with settled concepts of regulatory pricing." Petition 17. Just as petitioner's prior claim was an exemplar of settled law, this argument—again, putting aside its inaccuracy—is an archetype of fact-bound issues within the purview of the agency. The nuances of the complex relationship between access charges and the recovery of loop costs have no broad implications for the law outside of the unique context of this case. At a minimum, in the absence of fundamental and far-reaching disagreement

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[5] *See* Petition 14 (asserting that "the court of appeals judgment is a highly troubling departure from settled canons of statutory construction").

among the federal circuit courts of appeals on such fact-specific matters—which would be surprising indeed—they are not proper subjects for review by this Court.[6]

Petitioner does not even attempt to argue that the lower court's construction of § 254 will have any dramatic consequences for consumers or society as a whole. To the contrary, the rules upheld by the Fifth Circuit will—as the FCC expressly found—"simplif[y] the current rate structure, move[] towards cost-based rates, reduce[] consumers' overall rates, and simplif[y] long-distance bills, thereby resulting in less consumer confusion." *CALLS Order*, 15 FCC Rcd. at 12993-94. In addition, the rules will "better promote[] competition by sending potential entrants economically correct entry incentives," and consumers will further benefit from that increased competition. *Id.* at 12991.

4. Finally, petitioners argue at some length that certiorari review is justified to address a purported "conflict" between state and federal agency interpretations of § 254(k). This claim is procedurally barred because petitioner's briefs before the Fifth Circuit contain no trace of it—indeed, petitioner failed even to cite the state regulatory decisions upon which it now relies.

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[6] Moreover, in addition to being wrong for the reasons cited by the Fifth and Eighth Circuits, petitioner's argument is also wrong because the use of the loop to originate and terminate long distance calls—termed "access to interexchange services" in FCC regulations—is, together with local telephone service, a service included in the definition of "universal service." *See* 47 C.F.R. § 54.101(7). Nothing in § 254(k), upon which petitioner relies, governs cost *allocation* between the different services included within the definition of universal service. *See* Brief of Intervenor Coalition for Affordable Local and Long Distance Service (CALLS) at 39-40, *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) (No. 00-60434). This point further illustrates the fact-specific nature of this case.

Even if petitioner had laid the foundation for this argument below, like petitioner's other arguments, it clearly bears no relation to the Court's well-established criteria for issuance of a writ of certiorari. *See* S. Ct. Rule 10. First, while this Court's criteria for granting certiorari expressly include situations in which "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," *id.*, they do not—and should not—extend to alleged "conflicts" between state and federal regulators. The decisions of state administrative agencies are properly subject to review first in the state court systems. But the state courts may, if presented with this issue, agree with the Fifth and Eighth Circuits, avoiding any conflict. Review at this stage is thus premature.

Petitioner's alleged "conflict" is, in any event, non-existent. As discussed above, recovering the costs of LEC facilities used to provide both intrastate and interstate service is a two-step process. The first step involves separating, or *allocating*, these costs between the interstate and intrastate jurisdictions; that task is performed by the FCC, working with a Federal-State Joint Board established pursuant federal statute. *See* 47 U.S.C. § 410(c) (1976); *see also NARUC*, 737 F.2d at 1104-05. The second step involves creating rules for actually *recovering* those costs from the various parties potentially liable for them. This latter task is accomplished by federal regulators for those costs allocated to the *inter*state jurisdiction, and by state regulators for those costs allocated to the *intra*state jurisdiction. *See id.* The FCC Order challenged by petitioner addresses recovery of *only* those costs allocated to the *inter*state jurisdiction – a question over which state regulators do not have (or, for that matter, claim to have) any authority. Accordingly, on the only issue properly presented here—*inter*state cost recovery—there is not and could never be any "conflict" between state and federal regulators. Moreover, because state and federal

regulators have separate spheres of responsibility, determineations by those authorities to recover the costs allocated to their respective jurisdictions in different ways do not subject parties to conflicting requirements with which they cannot simultaneously comply.

In sum, petitioner's limited efforts to go beyond rearguing the merits to justify certiorari review are unavailing. The question presented by petitioner is a fact-specific application of settled law, on which the federal authorities, both administrative and judicial, are unanimous. Review by this Court is clearly unwarranted.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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